

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1230

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P/S

*To be argued by*  
THURL STALNAKER, JR.  
Law Student Intern

Pursuant to Student Practice Rule § 46(e)

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## United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 76-1230

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

WILLIAM CARLO,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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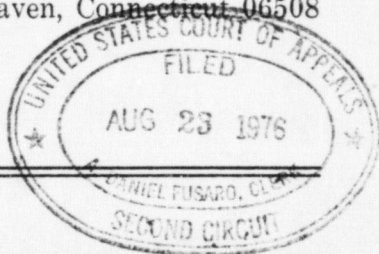
### BRIEF FOR THE APPELLEE

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PETER C. DORSEY  
*United States Attorney*  
District of Connecticut  
270 Orange Street  
New Haven, Connecticut 06508

THURL STALNAKER, JR.  
*Law Student Intern*



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**Question Presented**

Was the District Court correct in refusing to submit the issue of entrapment to the jury?

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 76-1230**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

WILLIAM CARLO,

*Appellant.*

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**BRIEF FOR THE APPELLEE**

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**Statement of the Case**

This is an appeal from a judgment of conviction in the United States Court for the District of Connecticut entered by the Court, Newman, J., on May 14, 1976 after jury verdicts of guilty on four counts on March 24, 1976.

On June 25, 1975, a federal grand jury sitting in New Haven, Connecticut, returned a nine count indictment charging appellant, William Carlo, with various firearms violations in connection with his activities as a licensed dealer of firearms and ammunition and involving Title 18, United States Code, Sections 922(b)(1), 922(b)(3), 922(b)(5), 922(m), 923, and 924(a). On July 21, 1975, counsel was appointed and appellant entered a plea of not guilty to all counts. On January 26, 1976, appellant filed a motion to sever three counts, which motion was eventually granted. A jury of twelve was impaneled and sworn

on February 24, 1976 and trial began on March 22, 1976 on six counts. At the conclusion of all of the evidence, the Government withdrew two counts of the amended indictment and thus the indictment, as presented to the jury, charged Carlo with two counts of selling a firearm to an individual whom he had reason to believe was a non-resident of the State of Connecticut, in violation of Title 18, United States Code, Section 922(b)(3) and 924(a) and two counts of failure to record the name, age and place of residence of the purchaser of firearms on each occasion, in violation of Title 18, United States Code, 922(b)(5) and 924(a). These offenses arose out of two sales of firearms, one on July 11, 1974, and the other on July 22, 1974. On March 24, 1976, the jury returned verdicts of guilty on all four counts of the amended indictment as it was submitted to them.

On May 7, 1976, appellant was sentenced to two years on each count, suspended after three months and placed on probation for three years, the sentences to run concurrently. A Notice of Appeal was filed on that date. Appellant remains at liberty pending appeal on the condition of a \$1,000 non-surety bond.

### **Statement of Facts**

The Government, at trial, presented evidence to show that William Carlo, in July of 1974, was licensed by the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, (hereinafter AT&F) as a firearms dealer. On two occasions he sold a handgun to an individual whom he had reason to believe was a non-resident of the State of Connecticut. On both occasions he did not complete the AT&F Forms 4473 which called for the name, date of birth (age), and residence of the buyer and which were required in connection with these transactions.



Special Agent Richard Dotchin, of AT&F, testified that in July, 1974 he resided in West Springfield, Massachusetts, and came to Connecticut on July 11, 1974 to operate in an undercover capacity. On that date he was introduced to Carlo by an informer, Theodore Bansak, at Carlo's home in Bridgeport, Connecticut. Bansak informed Carlo that Dotchin was from Massachusetts and wanted to buy a gun "without papers". Carlo immediately, without any persuasion and on his own initiative escorted Bansak and Dotchin to the cellar of his home and displayed approximately fifteen handguns, all of which were offered for sale by Carlo "without papers". Transcript (hereinafter Tr.) at 17. From this display, Dotchin selected a Spanish military model, 1914, 7.65 mm. caliber, semi-automatic pistol, Serial No. 464. Government Exhibit 2. While examining the firearm he asked Carlo if he could be sure the firearm could not be traced. Carlo replied that it could not be traced since it was manufactured in 1914, and thus no records were available for it. The price was negotiated and Dotchin paid Carlo \$50 for the firearm. Carlo requested Dotchin's assurances that he would not disclose the identity of the seller if he were caught with the gun. During the course of the negotiations with Carlo, Dotchin stated to Carlo that it was difficult to obtain guns "without papers" in Massachusetts where he resided. Tr. 18. Dotchin also testified that the AT&F Form 4473 was not completed as required by law, nor did Carlo take the information that would assist him in completing that form. Dotchin testified that the Federally-licensed firearms dealer and the purchaser are required to complete this form as a record of the sale of a firearm. Tr. 19-21.

On July 24, 1974, Dotchin, accompanied by AT&F Special Agent Charles Petersen, also acting in an undercover capacity, went to Carlo's home where Dotchin negotiated the purchase of a second handgun, a .22 caliber Derringer (Exhibit 3) for \$50. Tr. 25. During these

negotiations, Carlo indicated that it was getting harder and harder to find guns to sell without papers. Tr. 25. Carlo accompanied Dotchin and Petersen to Dotchin's car after the conclusion of the sale, the car being parked in Carlo's driveway which was lighted. Dotchin's car bore Massachusetts license plates. Tr. 26. No AT&F Form 4473 was completed in connection with this sale. Tr. 27.

Special Agent Charles Petersen testified in corroboration of Dotchin's version of the sale of July 22, and that he had searched the records of the Secretary of the Treasury and found no AT&F Forms 4473 completed for either of the two sales. Tr. 63-70. He also testified that he had test-fired the weapons purchased by Dotchin and found them operable. Tr. 63-64.

Carlo testified in his own defense and admitted that he was a Federally-licensed firearms dealer at the time of the sales, Tr. 83, and that he was familiar with the regulations which required him to complete AT&F Forms 4473 whenever a weapon was sold. Tr. 93. He also admitted that he knew that it was a violation of Federal firearms laws to sell a handgun to a person whom he had reason to believe was an out-of-state resident. Tr. 109. He admitted selling the two weapons to Dotchin, failing to complete the AT&F Forms 4473 and that Dotchin had indicated that he was from Massachusetts. Tr. 93-94. Carlo's claim was that he participated in these illegal sales as preliminary steps to larger transactions with the individuals whom he would at some later time turn over to the police. Tr. 101. Carlo testified that he had "reported" some of the activities of the AT&F informer, Bansak, to Officer C. J. Stites, of the Connecticut Regional Crime Squad prior to the July 11 sale. He also claimed that he concluded as of that time that Bansak was an unsavory character whose activities were harmful to honest citizens who were engaged in legitimate firearms

transactions. Tr. 89-90. He conceded that he had conducted the July 11 sale without any documentation and without any prior authorization from Stites to do so in that manner. Tr. 93, 100, 104, 115. He claimed that Dotchin, on July 11, had expressed an interest in exchanging hand grenades for large caliber handguns and admitted that Dotchin had said that he was from Massachusetts. He described the Spanish semi-automatic gun as part of his personal collection which he had not held out for sale previously. The gun was, however, withdrawn from his personal collection for sale to Dotchin once he was informed that Dotchin wanted to negotiate the purchase of an untraceable gun. Tr. 95. Some time after the July 11 sale, Carlo claimed that Stites was told that he (Carlo) "had been starting to make the arrangements for this deal". Tr. 102. Carlo testified that Stites encouraged him to make arrangements with Dotchin to exchange grenades for the large caliber handguns. Tr. 102. Carlo admitted that on July 22, 1974, subsequent to his conversation with Stites, he sold the second gun to Dotchin in the presence of Agent Petersen, again without the required papers. Tr. 102-103. The Derringer, he claimed, was also removed from his private collection specifically for the purposes of sale to Dotchin. Tr. 103. After the second sale, he again spoke with Stites who told Carlo that he was now prepared to "move" any time the purchasers were prepared to complete the larger transaction, involving the hand grenades. Tr. 103-104.

While Carlo's contention was that he was acting under the color of law in selling the handguns illegally to Dotchin, he conceded that Officer Stites never authorized him to make these sales, but nevertheless he believed that his actions were legal and proper. Tr. 104. In point of fact, he never told Stites that he was making the sales because he was afraid that Stites would not approve of his activities. Tr. 104. He also admitted that he had not



kept track of the money that he had received from the sales of either of these weapons. Neither did he ascertain the same of the individual to whom he sold the guns, nor did he keep a record of the transactions or give a description of the guns to Stites. He did not remember giving the telephone number of Dotchin to Stites, nor did he ever obtain the license number from Dotchin's car and give that to Stites. Tr. 111, 116, 117-123, 126. Nor did he take any steps to notify AT&F about either of the sales Tr. 123.

On cross-examination, Carlo testified as to his involvement in a similar act, the illegal sale of a weapon in White Plains, New York, on August 13, 1974. The transaction was completed without the necessary forms being filled out and he admitted that he had "an idea" that the transaction was illegal. Tr. 162. The guns in that instance had been transported by him from Connecticut to New York. He claimed that he did not know who had owned the guns nor who had accompanied him to New York to negotiate the sale, nor whether that individual was licensed to carry guns for the State of Connecticut. He testified that if they had been stopped by the police, Carlo would have indicated that he had a license to carry the guns even though the weapons were not his. Tr. 162. He testified that this transaction occurred during the period of time that he claimed that he was attempting to assist Officer Stites, but nevertheless he admitted that he did not inform Stites or AT&F of the sale. Tr. 164, 170, 174.

Carlo also presented the testimony of Officer Stites, a Bridgeport policeman assigned, in July, 1974, to the Southwest Regional Crime Squad as an undercover officer working in the field of narcotics. Stites testified that he did have a conversation between March and August, 1974 with Carlo in which Carlo indicated that there was a

possibility he might be able to introduce Stites to a person from outside the State of Connecticut who was willing to sell hand grenades. Tr. 179. Stites testified that he told Carlo that he was interested in this person and would attempt to purchase a hand grenade if it were for sale. Tr. 179-180. He told Carlo to go ahead and see what he could do to set up such a transaction with the non-resident, cautioning Carlo, however, against putting any pressure on himself or on his (Carlo's) family. Tr. 180. There was never any formal relationship between Carlo and Stites and Carlo was thus not an employee of the Regional Crime Squad but was what was considered an "informal" informant. Tr. 180. Stites could not recall the date of the conversations with Carlo. Tr. 181. Stites specifically testified on direct that he never authorized Carlo to do anything illegal and stated that Carlo never told him about any gun sales that he might have made to set up the hand grenade transaction. Tr. 181.

On cross-examination, Stites contradicted Carlo's testimony in regard to the number of handguns present in Carlo's home. Tr. 186-187. Stites testified that he instructed Carlo that while he was willing to accept the information from him, he was not to transact any business in and around his home nor was he to violate any laws. Tr. 187-188. Carlo never informed Stites of sales of any weapons to anyone from Massachusetts nor did he ever given Stites a telephone number for an individual to whom he had sold guns. Tr. 190. Furthermore, Carlo had not provided Stites with a name or even a description of the people who might have been interested in providing the hand grenades. Carlo had indicated, however, that the person involved in the hand grenades was from Massachusetts. Tr. 192.

Carlo presented a number of character witnesses, who, on cross-examination, conceded the lack of knowl-

edge of other gun violations by the defendant when they formed their opinion of him. See the testimony of Dr. Brian Huda, Tr. 208-209, of John E. Foley, Tr. 213-214, and Roland Paquin, Tr. 233.

The Government's rebuttal evidence consisted of the testimony of AT&F Special Agent Joseph Kelly who testified that on August 13, 1974, he had purchased two .45 caliber weapons directly from Mr. Carlo for the sum of \$300. At the time of this sale, Kelly was acting in an undercover capacity. No Federal firearms forms (AT&F Forms 4473) were completed in connection with this transaction as required by law. Tr. 238.

The Court denied defendant's request for an entrapment instruction. Tr. 255-277. The jury subsequently convicted Carlo on all four counts of the Amended Indictment as it was presented to them.

Defendant has grossly obfuscated the issues here, mixing the apples of entrapment with the bananas of justification. They do not mix. They do not produce a basis for an entrapment defense.

## ARGUMENT

### **Justification is not a defense to a charge of criminal conduct.**

The case centers on the mental processes of defendant leading up to his acts for which he has been indicted. Here we are not obliged to infer what the defendant's mind's working were. He has testified amply. It is summarized in his brief:

"Carlo thought that it was all right to make this sale because he was helping catch a criminal,

and Carlo thought in order to help catch a criminal, he had to get his confidence. Carlo thought that because he was helping law enforcement, it would be all right."

Defendant's Brief, p. 5-6.

When the matter was raised below, the claim of the defense was described by defense counsel:

"... the defense theory was 'a derivative of entrapment' and added 'it is sort of a combination of public duty defense and entrapment defense and justification defense'. Defense counsel reserved his right to request an entrapment instruction, noting 'I would like to withhold my judgment on that, Your Honor, until the morning. I think that, as I said earlier in the case, it may be in fact a quasi-entrapment or reliance similar to the Cox case in Alabama. . . '".

Defendant's Brief, p. 8-9.

Judge Newman dealt with the claim of justification by charging the jury that a defendant is not excused for his acts on the theory that they will lead to arrests for other unlawful acts. Tr. 291. Defendant does not challenge that aspect of the charge. He has not appealed on that ground.

### **Defendant's evidence was of justification and not of entrapment**

All of defendant's evidence beyond the fact that it was the agent who approached the defendant seeks to justify his acts. He does not prove that he was induced by Government agents to commit the acts.



Defendant is contradicted by the agents and Officer Stites in many respects, but quoting defendant's version in order to evaluate the trial Judge's finding that the entrapment defense was not applicable, *United States v. Dehar*, 388 F.2d 430 (CA 2, 1968), defendant has still offered only evidence of justification. Defendant was approached by Dotchin who wanted to buy large handguns without papers. Tr. 93. According to defendant he did not have such guns and thus no sale resulted. However, claims the defendant, he got wind of a possible grenade sale and he sought to bring that about. The gun sales that resulted in the charges here were not the result of Dotchin's solicitation, if it be such, because Carlo did not have what Dotchin was seeking. That should end the matter as Carlo did not respond to the solicitation. What he did in effect was not in response to the solicitation but in response to some other motivation.

Defendant, however, jumps to the actual sale which he instigated, i.e., of another type of gun which was not even for sale. He took the gun from his personal collection (Tr. 95) and sold it not a Dotchin's instance, nor under any pressure from Dotchin but rather:

1. Because "I was primarily interested in selling just to keep his interest." Tr. 93.
2. Because there was the "thought . . . of getting him to come back and make this transaction with the hand grenades. I asked him to come back, and I wanted to make sure he did. I wanted to show him good faith on my part. I wanted to pretend I was just as bad as he was." Tr. 93.
3. "I wanted him to buy it". Tr. 101.
4. "Because I was getting him to agree to make this deal with me, and I wanted to convince him that I was of good faith." Tr. 101.

None of that testimony constitutes an exoneration from the evidence of predisposition. Defendant asserts that the acts had a proper purpose, the making of a case for selling grenades. That is not proof of entrapment, of the overcoming of his will, of his doing criminal acts at the instigation of another. It is, at best, an effort to justify his acts. Such evidence is not relevant to the entrapment issue. Judge Newman so ruled and the defendant has not appealed that ruling. The defendant seeks to combine two components: Dotchin's interest in purchasing guns without papers and Stites' willingness to make cases. He seeks to add them all together and from the resulting stirring to obtain an entrapment charge and submission to the jury. Such a combination does not amount to inducement and there is no authority cited for that proposition.

It is significant that the claim of the defendant has application only to the charge of selling without the required papers. Defendant makes no such claim with respect to the charge of selling to a non-resident other than that Dotchin appeared at his home willing to make a purchase. He knew of the non-residence and makes no claim other than that he sold the guns in response to Dotchin's presence and willingness to buy and for the purposes of producing the illicit transaction in grenades. See Tr. p. 109.

**Defendant's evidence does not challenge or  
contradict the evidence of predisposition**

Dotchin made himself available for the sales, the merest, of "solicitation on the part of the Government [which] does not by itself constitute entrapment." *United States v. Berry*, 362 F.2d 756, 758 (CA 2, 1966). It is the Government's position that it has clearly proven predisposition and absent some challenge or contradiction

offered by the defendant, the issue of entrapment is properly not to be submitted to the jury. *United States v. Licursi*, 525 F.2d 1164 (CA 2, 1975); *United States v. Greenberg*, 444 F.2d 369 (CA 2, 1971), *cert. denied*, 404 U.S. 853 (1971); *United States v. Miley*, 513 F.2d 1191 (CA 2, 1975); *United States v. Nieves*, 451 F.2d 836 (CA 2, 1971). The two calls made in *Licursi* by the informant are precisely of the same nature and effect as Dotchin's presenting himself at Carlo's home prepared to buy guns without papers. Indeed Carlo kept the sales proceeds in this instance for his own use. Tr. 111.

"Carlo contends that his apparent predisposition to make the illegal sales was . . . a good faith effort to set up a future illicit transaction. . ."

Defendant's Brief, p. 19 *et seq.* This does not constitute evidence of a challenge or contradiction to the evidence of predisposition, using the language of *Licursi*, *supra*, at 1168 and 1169. It does not suggest a lack of predisposition. Rather, it clearly establishes the intention to do the acts for a purpose formed in Carlo's own mind. This is not creative of the crime in the terms of *Sorrells v. United States*, 287 U.S. 435 (1927), nor *United States v. Sherman*, 200 F.2d 880 (CA 2, 1952). Rather than show that he would not have done the acts but Dotchin's solicitation and his working for Stites, Carlo claims that he did the acts because of what he claims was an existent and legitimate purpose, the production of the illicit transactions in grenades. In short, his mind was made up to do the acts not because of Dotchin's inquiry but because, in his mind, he was serving Stites' purpose by providing evidence of another illegal transaction. That is an explanation of his acts. That is not proof that his embarking on the criminal course of the sales without the papers and to a non-resident was conduct which resulted from pressures or persuasion to perform the criminal acts by



either Dotchin or by Stites. Indeed, the defendant doesn't even contend that Stites knew of the actual acts, and he concedes that he knew that he was not authorized to act illegally as a result of anything that Stites said to him, and further, he was aware that Stites would not approve of unlawful acts. Tr. 104.

As *Licursi, supra*, clearly requires before the issues of entrapment go to the jury, defendant must prove that his will was pressured or that he was persuaded. So in *United States v. Anglada*, 524 F.2d 296 (CA 2, 1975), the charge was required as the defendant there offered evidence that he was pressured to overcome an initial reluctance until he was convinced to do the acts. Carlo was not "convinced" to act by the Government agent. He wanted to act of his own accord, selling for the purpose of keeping Dotchin on the string from which a grenade sale might be accomplished. This was not Government activity which implanted in Carlo's mind, as that of an innocent person, the disposition to commit the alleged offense and to induce its commission. See *Hampton v. United States*, — U.S. —, 44 L.W. 4542, 4544.

The agents merely provided the opportunity and not the impetus from which the acts came to be performed. See *United States v. McMillan*, 368 F.2d 810, 812 (CA 2, 1966), *cert. denied*, 386 U.S. 909; *United States v. Barash*, 412 F.2d 26, 30, (CA 2, 1969), *cert. denied*, 396 U.S. 832.

Defendant's evidence of good character, subject to question by the fact that the witness did not know of other gun violation arrests, Tr. 208-209, 213-214, 233, nor that Carlo had at least been present at if not the actual seller in a sale of guns under the same circumstances as in this case on August 13, 1974. Tr. 238. See also Tr. 161-162. But such evidence does not counter evidence of predisposition. *United States v. Bishop*, 367 F.2d 806 (CA 2, 1966).

Evidence of justification, as offered by Carlo, does not counter evidence of predisposition but rather it is an offer of an explanation. Defendant says not that he did these acts at the instigation of another, a Government agent, nor that he was prompted to act as was wished and sought by another, but rather that he acted of his own volition, because he wished to achieve another purpose, separate and apart from Dotchin's intent. There is no authority cited for this hybrid offer of evidence claimed to constitute proof of entrapment. As the motivation for the acts was Carlo's alone, and not even that of Stites, in any specific sense, defendant has at best proven, not that he was entrapped, but that he did illegal acts in the mistaken belief that his motives would excuse him from the illegality.

"His willingness, his eagerness to make the sales, his apparent predisposition to commit the crimes charged was . . . a pose and a sham" to bring about the "illegal activity", i.e., the grenade transaction."

See Defendant's Brief, Pages 20-23. That is not an entrapment defense. In effect, Carlo was, for his own purposes which he thought would please Stites, "ready and willing without persuasion" in the terms of *United States v. Riley*, 363 F.2d 955, 959 (CA 2, 1966), citing *United States v. Sherman*, *supra* at 882, 883, to commit the acts which constituted the violation. He was not persuaded by the agents to act. He acted for his own reasons.

Evidence of good faith by Carlo does not substitute for the required evidence challenging or contradicting the evidence of predisposition. *United States v. Licursi*, *supra*. The defendant was thus not entitled to the entrapment charge.

**SUMMARY**

Since justification is not a defense to a charge of criminal conduct, since defendant's evidence in the face of the Government's proof of predisposition was of justification, that is, proof of ends which he claimed justified the means, and because defendant's evidence in no way challenged nor contradicted the evidence of predisposition as offered by the Government, the defendant was not entitled to a charge of entrapment. The defendant's appeal should not be sustained.

Respectfully submitted,

PETER C. DORSEY

*United States Attorney*

District of Connecticut

270 Orange Street

New Haven, Connecticut 06508



United States Court of Appeals  
FOR THE SECOND CIRCUIT

No. 76-1230

UNITED STATES OF AMERICA

Appellee

v.

WILLIAM CARLO

Appellant

8/23

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 184th Street Flushing, N.Y.

served the within Brief for the Appellee upon Gregory A. Craig, Esq.; 30 South Street, Middlebury, Vermont 05753

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

*Stephen Zedalis*

This 23rd day of August 1975

*Edward A. Quimby*

EDWARD A. QUIMBY  
Notary Public, State of New York  
No. 24-3183500  
Qualified in Kings County  
Commission Expires March 30, 1977